FMLA and Workers Compensation

Common Questions Answered



The federal Family and Medical Leave Act (FMLA) and state workers' compensation laws may both cover a team member who suffers a serious health condition while on the job. The Department of Labor (DOL) has issued revised regulations that implement the FMLA. Though the interplay between the FMLA and workers' compensation leaves was addressed within those regulations, a number of DOL letter rulings have also clarified the interaction of these laws.

This Risk Insights article will answer common questions regarding team member leaves that qualify for protection under both the FMLA and workers' compensation laws.

Does FMLA leave run concurrently with a workers' compensation absence?

The team member's FMLA leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a "serious health condition." Thus, a team member could receive workers' compensation benefits to replace lost wages, while at the same time having health benefits maintained under the FMLA. However, if appropriate, the employer must be sure to designate this leave as FMLA-qualifying leave and must give notice of the same to the team member. If the employer fails to designate this leave as FMLA leave, the team member may still be entitled to FMLA leave once the workers' compensation absence has ended.

Can an employer require a team member to substitute accrued paid leave if the team member is on workers' compensation and FMLA leave?

Since the workers' compensation absence is already considered paid leave, the FMLA provision for substitution of the team member's accrued paid leave for unpaid FMLA leave does not apply. More specifically, if the team member has elected to receive workers' compensation benefits, the employer cannot require the team member to substitute any accrued paid leave for any part of the absence that is covered by the payments under a workers' compensation plan. However, a team member is also precluded from relying upon the FMLA's substitution provision to insist upon receiving both workers' compensation and accrued paid leave benefits during such an absence. However, employers and team members may agree, where state law permits, to have paid leave supplement the disability plan or workers' compensation benefits, such as in the case where a plan only provides replacement income for two-thirds of a team member's salary.

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What benefits is a team member entitled to while on concurrent workers' compensation and FMLA leave?

If the employer designates the workers' compensation absence as FMLA leave, then the team member is entitled to all employment benefits accrued prior to the date on which the leave commenced. The FMLA does not entitle the team member to the accrual of any seniority or employment benefits during any period of FMLA leave, nor to any right, benefit or position have been entitled had the team member not taken the leave.

What benefits is a team member entitled to while on concurrent workers' compensation and FMLA leave?

Thus, a team member on FMLA leave does not accrue seniority or employment benefits during the absence by operation of the FMLA. Nevertheless, in addition to the group health benefits guaranteed under the FMLA, an team member on FMLA leave, whether paid or unpaid, may be entitled to additional benefits while absent, depending on the employer's established policy for providing such benefits when team members are absent on other forms of leave.

How may a team member on concurrent workers' compensation and FMLA leave pay for group health coverage? For other non-health benefit premiums?



A team member who is receiving payment as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. It is important that the employer make such arrangements with the team member in advance of the leave or shortly after the leave begins since the FMLA provision for recovery of the employer's share of health insurance premiums does not apply. That is, the FMLA statute only authorizes the recovery of the employer's share of insurance premiums that are paid to maintain coverage for the team member under a group health plan during any period of unpaid leave. Leave taken pursuant to a workers' compensation plan is not unpaid leave within the meaning of the FMLA.

Likewise, an employer will also want to make prior arrangements for team member payment of other non-health benefit premiums when a team member is receiving payment as a result of a workers' compensation injury and is simultaneously taking unpaid FMLA leave. Again, neither the FMLA statute nor its regulations provide for the employer's recovery of any such premiums paid during a paid leave as opposed to during an unpaid leave.

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What may an employer do if it questions the adequacy of a medical certification?

If a team member is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the team member's workers' compensation health care provider, the employer may follow the workers' compensation provisions. That is, the employer may have direct contact with the team member's health care provider in the manner in which the workers' compensation statute provides. Further, the revised FMLA regulations also provide that an employer can contact a team member's health care provide to authenticate or obtain clarification of the medical certification, so long as the employer has first given the team member a chance to cure any deficiencies.

Is a team member required to return to a "light duty" job when it is not the same job or is not equivalent to the job the team member left?



If the health care provider treating the team member for the workers' compensation injury certifies the team member is able to return to a light duty job, the team member may decline the employer's offer of a light duty job if it is not the same or is not an equivalent job to the job the team member left. However, as a result of turning down such light duty job, the team member may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the FMLA entitlement is exhausted. Additionally, when the workers' compensation benefits cease, the team member may elect, or the employer may require the use of accrued paid leave.

Is a team member required to return to a "light duty" job when it is not the same job or is not equivalent to the job the team member left?

If the team member accepts the light duty position in lieu of FMLA leave or returns to work before the FMLA leave entitlement ends, the team member retains the right to the original or to an equivalent position. However, the period of time employed in a light duty assignment cannot count against FMLA leave entitlement. The right to restoration is held in abeyance during the period of time the team member performs a light-duty assignment. That right is not unlimited and ceases at the end of the applicable 12-month FLMA leave year. Restoration is dependent on the team member's ability to perform the essential functions of the same or equivalent position at the end of FMLA leave.

What happens to a team member on concurrent workers' compensation and FMLA leave once the FMLA leave entitlement has run out?

If the team member is unable to return to work or is still in a light duty job after the FMLA leave entitlement has run out, the team member no longer has the protections of the FMLA and must look to the workers' compensation statute or to the federal Americans with Disabilities Act (if the team member is a "qualified individual with a disability") for any further relief or protections.

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